NO. 49063-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAYANARA CASTILLO,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case requires the Court to determine whether the Department of Social and Health Services ("DSHS" or "the Department") has the authority to correct errors in its own records at the request of a person harmed by those errors. If the Department is to be believed, the passage of time is adequate to strip it of authority to make these corrections to its child abuse and neglect database.

Dayanara Castillo followed the literal language of a notice that informed her how to challenge the Department's finding that she neglected her children, but the Department denied her a hearing to contest this allegation. The Department determined that it lacked legal authority to review the finding because it received the request one day late. The Department has consistently maintained this position throughout the history of this case.

Ms. Castillo is now subject to a lifetime stigma as a "child abuser", and the consequential harms to her employment opportunities, without ever having a hearing on the merits of this allegation. In addition to this stigma, the Department will permanently maintain an erroneous record that does little to protect children and vulnerable adults.

Due process requires procedures that prevent an erroneous denial of a protected interest. The Department's mistaken understanding of its lack of authority to review late requests, and its failure to evaluate whether Ms. Castillo had good cause for her alleged late filing, creates too high a risk of wrongly depriving people like Ms. Castillo of their protected interests.

Preventing and reducing risk of error is a fundamental principle of due process, owed to Ms. Castillo because of the devastating impact of a child neglect finding on her reputation and employment opportunities. The Department should be held to a standard that complies with due process and promotes hearings on the merits and not default findings. The Department should not deny a person accused of child abuse or neglect the right to a hearing based on a rigid and erroneous interpretation of its own authority to correct its mistakes. This Court should reverse the dismissal of Ms. Castillo's hearing and remand for a hearing on the merits.

II. ASSIGNMENT OF ERRORS

The Department erred when it entered an order of dismissal on December 31, 2014, finding that it lacked subject matter jurisdiction because the agency did not receive Ms. Castillo's request for internal review of the alleged child neglect finding within 30 days after notice of the allegation was received by someone at her home.

Issues Pertaining to Assignment of Errors:

A. Whether Ms. Castillo timely requested internal review by filing her request within 30 days of the date she received the letter, as instructed to do so by DSHS.

B. Whether the Department erred in its October 16, 2013 determination that it lacked legal authority to review an allegedly late request for internal review.

C. Whether the Office of Administrative Hearings and, by extension the Department, acted arbitrarily and capriciously by concluding that the Department had no legal authority to review the finding.

D. Whether, if the agency does not have jurisdiction to review a late finding, DSHS's process for reviewing findings is unconstitutional under the Due Process Clause of the United States Constitution.

E. Whether the Board of Appeals review judge erred by refusing to consider Ms. Castillo's petition for review.

III. STATEMENT OF THE CASE

A. Facts specific to Ms. Castillo's appeal

In June 2013, Ms. Castillo lived with her husband, Charles Kleeberger, in Shoreline, Washington.[1] Ms. Castillo's two children, aged 10 months and 17 years at the time, lived with her.[2]

That month, police searched Ms. Castillo's home based on an allegation that Ms. Castillo's husband or a person residing in the home possessed stolen firearms. In August 2013, the Department alleged that

[1] Declaration of Dayanara Castillo, Administrative Record (AR) 56-59, at ¶ 3.
[2] *Id.* at ¶¶ 3, 4.

Ms. Castillo had neglected her two children. The Department made this allegation based upon a written police report from the June 2013 search.[3] The report stated that the family lived in a home where firearms were present and where another person lived as a tenant in the basement who had a prior criminal and Child Protective Services history.[4] Ms. Castillo strenuously denied she mistreated or neglected her children or that the children had access to firearms.[5]

On September 5, 2013, the Department's Child Protective Services (CPS) sent a letter to Ms. Castillo that concluded she had neglected her children.[6] The letter was sent by certified mail with return receipt requested.[7] It was addressed only to Ms. Castillo.[8] Ms. Castillo's husband signed for the letter on Monday, September 9, 2013 at 5:05 p.m.[9] Ms. Castillo's husband did not tell her about the letter until the next morning, September 10, when he told her that she had received something in the mail that he had had to sign for.[10] Ms. Castillo then read the letter, which

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[3] AR 63.
[4] AR 62.
[5] AR 71-72, 56-57.
[6] AR 62.
[7] AR 57, ¶ 5.
[8] *Id.*
[9] AR 69.
[10] AR 57, ¶ 6.

had not been opened yet. This was the first time she learned that CPS had made a "founded" finding against her.[11]

The letter stated that to review the finding:

> CA [Children's Administration] must receive your written request for a review within 30 calendar days from the date *you* receive this letter. **If CA does not receive the request within 30 calendar days of the date *you* receive this letter, you will have no further right to challenge the CPS findings.**[12]

Ms. Castillo concluded this meant that she had 30 days from the date *she* received the letter to request a review.[13] Acting pro se, she mailed her request for the internal review on October 9, 2013, within 30 days from the date that *she* received the letter.[14] In her request, she specifically and in great detail, denied the allegations against her.[15] Ms. Castillo contested the statements in the CPS allegations. She stated that it was not her partner who had been the subject of the search, as indicated by CPS, but that it was, in fact, the person they had allowed to stay in their home who was the subject of the search.[16] She stated that she had no knowledge of any firearms in the home.[17] There is no evidence in the record that criminal charges or a conviction of any person followed the police search.

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[11] *Id.*
[12] *Id.* at ¶ 7. (Bolding in original; italics added).
[13] AR 57.
[14] *Id.* at ¶ 9.
[15] AR 70-72.
[16] AR 71-72.
[17] *Id.*

CPS received her request for review on October 10, 2013, 30 days from the date that Ms. Castillo actually received the finding letter but 31 days from the date her husband signed for it.[18]

On October 16, 2013, the Department notified Ms. Castillo that the finding would not be changed because she did not timely request the review.[19] The Department's letter stated that the reviewer "did not have legal authority" to review her finding because it was "received on 10/10/13 which is past the allowed time frame of 30 calendar days."[20] On February 4, 2014, Ms. Castillo requested an administrative hearing to contest the agency action.[21]

The Department filed a motion to dismiss her hearing request for "lack of jurisdiction" on May 16, 2014.[22] Ms. Castillo opposed the motion, and the matter was heard by an administrative law judge (ALJ) on June 3, 2014.[23] On December 31, 2014, the ALJ ruled that Ms. Castillo did not have a right to a hearing because her request for supervisory review was received one day late.[24]

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[18] AR 73.
[19] *Id.*
[20] *Id.*
[21] AR 82.
[22] AR 60-61.
[23] AR 40-54.
[24] AR 33-36.

Ms. Castillo's representative sought review of the ALJ's decision by the DSHS Board of Appeals (BOA).[25] On April 28, 2015, the BOA affirmed the ALJ's dismissal of Ms. Castillo's request for supervisory review because her October 9, 2013 letter seeking review was one day late.[26] The BOA also determined that Ms. Castillo's then-representative had filed the petition for review one day late.[27]

Ms. Castillo timely petitioned for judicial review in the Thurston County Superior Court on May 20, 2015.[28] On May 20, 2016, the court affirmed the agency decision.[29] Ms. Castillo timely filed her Notice of Appeal on June 14, 2016.[30]

B. Regulatory overview of CPS administrative findings

The Department is authorized by statute to investigate reports of child abuse or neglect.[31] When the Department believes that a preponderance of evidence supports the report, and the allegations meet the statutory definition of "abuse" or "neglect", the Department is authorized to make a "finding" against the alleged perpetrator.[32] When the Department makes an abuse or neglect finding against a person, it adds

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[25] Declaration of David Girard, AR 23-24, ¶ 6.
[26] CP 15-27.
[27] *Id.*
[28] CP 4-14.
[29] CP 32-34.
[30] CP 35-36.
[31] RCW 26.44.100.
[32] *Id.*; WAC 388-15-129.

that finding to its computer system immediately and before notice to the alleged perpetrator.[33] The Department then notifies the person that she may have the finding reviewed. As in Ms. Castillo's case, an alleged perpetrator could receive this notice several weeks after the finding is actually entered into the CPS database. The review consists of a paper file review by a CPS manager not involved in the initial finding.[34] The manager may also review written material submitted by the alleged perpetrator.[35] If the manager reviewing the finding decides to uphold it, only then is the person notified of her right to request an administrative hearing with the Office of Administrative Hearings. The finding is not changed until either the Department upon review reverses it, or if upheld on review, the finding is reversed by an administrative law judge or a court.[36]

The finding, however, may be disclosed to current or prospective employers prior to completion of any review or hearing through routine background checks conducted by the state's Background Check Central

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[33] *See, e.g.,* WAC 388-15-141; Children's Administration Practices and Procedures Guide, sec. 2559C, *at https://www.dshs.wa.gov/ca/2500-service-delivery/2559c-cps-investigative-founded-findings-review* (last accessed Sept. 8, 2016) ("All findings will remain in effect as originally determined pending any internal review or administrative hearing."); *see also* AR 62.
[34] RCW 26.44.125; WAC 388-15-093.
[35] WAC 388-15-093.
[36] *See, e.g.,* WAC 388-15-141.

Unit.[37] A background check is performed any time a person seeks employment that includes access to a vulnerable adult or child, such as a school cook or custodian, or pursues licensure as a foster parent, for example.[38] The existence of a finding is an automatic and unreviewable barrier to employment in certain fields, such as home health care.[39]

IV. ARGUMENT

A. Standard of review

In judicial review of an agency decision under proceedings authorized by the Administrative Procedure Act, RCW 34.05 *et seq.*, the reviewing court may set aside a final agency adjudicative order where the order violates constitutional provisions; is outside the agency's statutory authority; is arbitrary or capricious; is not supported by substantial evidence when viewed in light of the whole record; or the agency has erroneously interpreted or applied the law.[40]

An appellate court applies the standards in RCW 34.05.570 "directly to the record before the agency, sitting in the same position as the

[37] WAC 388-06 *et seq.*
[38] *See, e.g.,* WAC 388-06-0130.
[39] RCW 74.39A.056(2).
[40] RCW 34.05.570(3); RCW 34.05.574(1).

superior court."[41] The party challenging the validity of agency action has the burden of demonstrating its invalidity.[42]

Each of the issues raised in this appeal raises questions of law or mixed questions of law and fact, all of which are subject to the "error of law" standard of de novo review.[43]

B. Ms. Castillo's appeal must be reinstated because she complied with the requirements to request internal review

The Department's Children's Administration (CA) received Ms. Castillo's request for internal review on the thirtieth calendar day after she actually received the notice. This is the timeline provided in the Department's letter about the finding. The notice specifically stated: "CA must receive your written request for a review within 30 calendar days from the date you receive this letter."[44] Ms. Castillo reasonably relied on the generally accepted definition of "receive" and submitted her review request to the Department within 30 days of the day she received the notice. The Department did not cite to any statute or regulation indicating that "you receive" means anything other than its literal meaning. Ms.

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[41] *Utter v. State, Dep't of Soc. and Health Servs.*, 140 Wn. App. 293, 299, 165 P.3d 399 (2007) (*quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).
[42] RCW 34.05.570(1)(a).
[43] *City of Seattle v. Pub. Emp't Relations Comm.*, 160 Wn. App. 382, 388, 249 P.3d 650 (2011).
[44] AR 57, ¶ 7.

Castillo's review request should have been deemed timely and the Department erred in not conducting the internal review.

RCW 26.44.100 requires the Department to use plain language in its notice to alleged perpetrators. If the statute defines a term in the notice, the court must rely on that definition.[45] If a term is undefined, the court should use a dictionary to determine its plain meaning.[46] Unless the Department provides legal authority in the notice that reasonably apprises the person of a different meaning, the plain language meaning should control.[47] Further, the statute upon which the Department's notice is based requires the Department to use "plain language" in the notice of an agency finding of abuse or neglect.[48]

Taken together, Ms. Castillo's reliance on the literal meaning of "you receive" is reasonable under the circumstances. Because she complied with the "plain language" of the notice, Ms. Castillo was entitled to DSHS review of the agency finding. If the Department intended something other than the standard definition of "you", then its notice is inadequate to convey that meaning. The Department's determination that it had no legal authority to review the finding was a clear error of law.

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[45] *Blue Diamond Grp., Inc. v. KB Seattle 1*, 163 Wn. App. 449, 454, 266 P.3d 881, 883 (2011).
[46] *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015).
[47] *See Pal v. Dep't of Soc. and Health Servs.*, 185 Wn. App., 342 P.3d 1190 (2015).
[48] RCW 26.44.125(2).

C. The Department and the ALJ have authority to review a late request and must review this finding

Even if this Court rules that the review request was untimely, the Court should reverse the administrative decision because the Department relied on an erroneous interpretation of its own legal authority to perform internal review. The Department compounded this error by moving to dismiss Ms. Castillo's timely hearing request because the ALJ "lacked subject matter jurisdiction."[49] Finally, the ALJ failed to consider Ms. Castillo's argument that she had good cause, even if the request for review was technically late. The Department's mistaken legal conclusion is an error of law, and the ALJ's failure to establish the record and consider her argument for good cause is arbitrary and capricious and should be reversed. Both erred in assuming that the time limit was jurisdictional and could not be waived for good cause or other reasons to ensure a fair result.

Neither the Department nor the ALJ lacked "jurisdiction", as the Department argued at the administrative hearing. The Department had authority to review Ms. Castillo's internal review request, and the ALJ had authority to consider whether she had good cause for a late request. The deadline to request internal review under RCW 26.44.125 is a claim-processing deadline and not a jurisdictional prerequisite for review. Such a

[49] AR 60-62.

deadline may be equitably tolled, and WAC 388-02-0020 allows ALJs to consider equitable arguments for late filing. Because the ALJ, and by extension the Department, retained authority to review Ms. Castillo's request, the failure to consider her argument that she had good cause for a late filing is arbitrary and capricious. This court should rule on the basis of the administrative record that Ms. Castillo had good cause for any failure to meet the appeal deadline and remand the case for a hearing on the merits.[50]

1. Requesting review within 30 days is not a jurisdictional prerequisite as a matter of law

In a letter to Ms. Castillo denying her request for internal review, the Department claimed it "did not have legal authority" to review the finding.[51] In response to Ms. Castillo's request for a hearing, the Department moved to dismiss because it, and by extension the ALJ, lacked "subject matter jurisdiction" to hear the case because of the "late" request for internal agency review.[52] Both conclusions are inappropriate applications of the concept of subject matter jurisdiction and the Department's decision should be reversed.

Absent clear legislative intent, a statutory time limit for an individual adversely impacted by an agency action to do something is not

[50] RCW 34.05.574(1)(b).
[51] AR 73.
[52] AR 60.

"jurisdictional."[53] Subject matter jurisdiction governs authority over the type of controversy involved, not necessarily the manner in which it is done.[54] Attempting to clear up the use of the term "subject matter jurisdiction," the courts have concluded that, unless a tribunal is without power to hear a matter, any defects go to something other than "subject matter jurisdiction." Determining the scope of a tribunal or agency's power requires the court to look at the statute authorizing that power. If the statute does not speak in terms of restricting the authority of the tribunal, or does not use the term "jurisdiction", then the prerequisite is not jurisdictional.[55]

In *Nickum v. Bainbridge Island*, this Court reviewed two time limits: a 14-day deadline for the affected person to request review by an agency, and a 21-day deadline to file a court action under the Land Use Petition Act (LUPA).[56] The Court held that the 14-day deadline was a statute of limitations and thus waivable, but the LUPA deadline was a jurisdictional rule. The Court reasoned that the rules did not indicate that

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[53] *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 377, 223 P.3d 1172, 1177 (2009), *as amended* (Dec. 8, 2009).
[54] *E.g., Marley v. Dep't of Labor and Indus.*, 125 Wn. 2d 533, 539 (1994) ("If the type of controversy involved is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction," *quoting* Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, BYU L. Rev. 1, 28 (1988)).
[55] *See, e.g., Erection Co. v. Dep't Labor & Indus.*, 121 Wn.2d. 513, 519, 852 P.2d 288 (1993) (finding that explicit use of the word jurisdiction imposed limits on agency authority).
[56] *Id.* at 372.

the time limit for the agency appeal was jurisdictional, and stated that "the time limit provision ... is separate from any jurisdictional section of the rules."[57] The *Nickum* court also found the lack of the term "jurisdiction" in controlling statutes relevant in concluding that the time limit was a statute of limitations and not jurisdictional.[58]

The *Nickum* court also noted that the legislature's restriction on the courts versus the agency is significant. "Although the statute does not use the word 'jurisdiction,' the legislature's use of the phrases 'is barred' and 'may not grant review' demonstrate the legislature's intent to *prevent a court* from considering untimely filings."[59]

The U.S. Supreme Court has also held that an administrative deadline is a statute of limitations subject to equitable tolling unless it is clearly shown to be jurisdictional.[60] The Court has said that "time prescriptions, however emphatic, are not properly typed jurisdictional."[61] In *Kwai Fun Wong*, the Court considered time limits in the Federal Tort Claims Act. It provides that a tort claim against the United States "shall be forever barred" unless it is presented to the appropriate federal agency

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[57] *Id.*
[58] *Id.* at 377 (*citing In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000)).
[59] *Id.* (emphasis added).
[60] *United States v. Kwai Fun Wong*, 575 U.S.__, 135 S. Ct. 1625, 191 L. Ed.2d 533 (2015).
[61] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235 (2006).

within two years and then brought to federal court within six months after the agency acts on the claim.[62] The Court reasoned that even this language carried no "talismanic jurisdictional significance" because it was an ordinary way to set a statutory deadline.[63] The Court held that the statute of limitations is not jurisdictional unless Congress provides "a clear statement" to that effect.[64] The Court went on to hold that, in applying the "clear statement" standard, it had held in the past that most time bars, even if mandatory and emphatic, are non-jurisdictional.[65]

Like the statutes governing deadlines in *Nickum* and *Kwai Fun Wong*, the relevant statute here, RCW 26.44.125, lacks evidence of legislative intent to create a jurisdictional rule. RCW 26.44.125 lacks the term "jurisdiction" when setting the deadline to request internal review.[66] Additionally, its reference to loss of hearing rights as a consequence of late filing is directed at the alleged perpetrator, not the agency. Hence, it is inadequate to deprive the agency of authority to revisit or correct decisions regarding child neglect findings issued by the Department.[67] Indeed the language considered non-jurisdictional in *Kwai Fun Wong*—"forever

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[62] *Id.* at 1629.
[63] *Id.* at 1634, 1638.
[64] *Id.* at 1632.
[65] *Id.* ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." (Citations omitted)).
[66] *Compare Hoisington*, 99 Wn. App. at 423.
[67] *See* RCW 26.44.125(2), (3).

barred"—is more emphatic than the "may not further challenge" language of RCW 26.44.125 in terms of jurisdictional significance.

The deadline for seeking internal agency review in RCW 26.44.125 does not impose restrictions on the agency's authority to conduct review to correct an erroneous finding at any time. It specifically addresses the ability of an alleged perpetrator to challenge the finding as a matter of right. It does not mention the agency's authority to review findings or use the word "jurisdiction." Because the statute in question does not speak in terms of the agency's authority, it was error for the Department and the ALJ to conclude it lacked "subject matter jurisdiction" to hear the case. The agency maintains the authority and discretion to review and reverse an agency action at any time and should do so when the facts so warrant. There is nothing "jurisdictional" about the timeframe for seeking agency internal review.

Finally, RCW 26.44.125 differs from the *Nickum* jurisdictional deadline in the target of the restriction. The LUPA jurisdictional deadline in *Nickum* provided that *courts* "may not grant review" after a missed deadline. Here the statute provides that the "alleged perpetrator … may not further challenge the finding and shall have no right to agency review,

to an adjudicative hearing or to judicial review, of the finding...."[68] In contrast, a jurisdictional rule speaks to the court's power, which goes to the heart of jurisdiction; the claim-processing rule at issue here instead speaks to an alleged perpetrator's rights. Compared with statutes which specifically address agency jurisdiction, it is clear that RCW 26.44.125 does not concern the scope of the agency's authority.[69] Without further and explicit language implicating jurisdiction, the rule setting a deadline for internal review must be presumed to be a statute of limitations. In Washington, statutes of limitations are not generally jurisdictional, and can be deemed "equitably tolled" when the interests of justice so require.[70] The ALJ also has the authority to consider whether the Department should be equitably estopped from denying Ms. Castillo a right to a hearing.[71]

The statute at issue in this case is non-jurisdictional and can be equitably tolled or waived by the agency. Given the gravity of harm resulting from a finding of child abuse or neglect, it should not be construed as such a rigid timeline that people are denied due process.

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[68] RCW 26.44.125(3).
[69] *See, e.g.,* RCW 34.05.413(1).
[70] *Millay v. Cam,* 135 Wn.2d 193, 205, 955 P.2d 791 (1988) ("In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.").
[71] *See* WAC 388-02-0495 (allowing the use of equitable estoppel to require the Department to "take action contrary to a statute").

2. The Department and the ALJ had authority to review the late request

The Department has authority to review a neglect finding at any time.[72] Even if the 30-day timeline to request review is deemed mandatory, it does not proscribe the agency's authority to act after that time or even if no request is received. The legislature would not impose the absurd result that an agency is without power to correct its own errors or records more than 30 days after the time when the error occurred.

An act by a state agency could be void if the agency lacked authority to perform it.[73] An agency lacks authority to act only if such act is outside the scope of its statutorily defined duties.[74] Agency authority is not withdrawn by an irregularity in performing the action.[75]

A consideration of a late request to review a finding of neglect is more properly considered a procedural irregularity than an act for which the Department lacks authority. It is not a limitation on the agency's ability to act. The failure of an alleged perpetrator of child abuse or neglect to meet a statutory deadline does not impair the Department's general authority to investigate, substantiate and review, or correct reports

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[72] RCW 26.44.010.
[73] *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010).
[74] *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).
[75] *Id.*

of abuse or neglect to ensure the accuracy of such reports and findings, and to otherwise protect the health and welfare of children.[76]

An agency's deviation from a statutory deadline is procedural rather than substantive, thus preserving its overall authority to act. Equity demands that a deviation from a statutory deadline by a party *challenging* the agency is also deemed procedural rather than substantive.

Additionally, when there is a "late" request, equitable tolling is recognized as a basis upon which a court may allow the "late" party to proceed with her claim.[77] The doctrine must be used sparingly, but should be used when it serves the overall purpose of the statute in question.[78] One purpose of the statute here is to provide due process to persons accused of abuse or neglect who are "often not aware of their due process rights ...."[79] Safeguarding against "erroneous ... information" in child abuse reports is another legislative purpose.[80]

Not only did the Department have authority to toll the deadline here, the ALJ had authority to correct the Department's refusal to do so. The ALJ can decide both that the Department erroneously failed to exercise its authority to review the finding and that the finding was

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[76] RCW 26.44.100.
[77] *Nickum*, 153 Wn. App. at 378.
[78] *Id.*
[79] RCW 26.44.100(1).
[80] RCW 26.44.010.

incorrect. The ALJ, and ultimately the Secretary (acting through the BOA review judge), misapplied the statutory framework and erroneously determined that there was no jurisdiction to either (a) conduct the review; (b) order the Department to conduct the review; or (c) proceed to review the finding on the merits, given the Department's refusal to review the finding in the first instance.

The Department's erroneous conclusion as to its own legal authority to review findings deprived Ms. Castillo of her right to due process. Because the error of law is clear, the Department's actions should be reversed.

3. The ALJ's failure to determine whether there was good cause for the "late" request for review was arbitrary and capricious

The ALJ had authority under 388-02-0020 to review the Department's refusal to conduct the supervisory review of the finding. Indeed, the ALJ had a duty to develop the record on this issue since Ms. Castillo raised it in her briefing. Ms. Castillo made a legitimate showing of good cause for her "late" request for review and invoked her right to ask for a waiver of the deadline. The ALJ's failure to evaluate this claim was error in light of all the facts and circumstances. WAC 388-02-0020(1) does not require the party raising a good cause claim to make any specific showing. It sets up an equitable basis for relief from a default in the

interests of justice under the standards of CR 60. The plain language of the rule authorizes the ALJ to consider "good cause" if there is a basis for doing so.

ALJs have a duty to develop the record as necessary to rule on the issues they must consider.[81] It is especially important for an ALJ to exercise this authority in a motion for a summary disposition and to construe the facts most favorable to the non-moving party if there is a dispute. Default judgments are disfavored, and courts prefer to resolve cases on their merits.[82]

In the initial order in this matter, the ALJ concluded that he did not have the power to make any rulings or determinations in response to Ms. Castillo's hearing request, apparently including whether Ms. Castillo had good cause for a late filing of her request for internal review.[83] The ALJ's opinion does not cite to the good cause regulation at WAC 388-02-0020 and provides no statement of the underlying evidence of record with respect to this issue. The ALJ's failure to review the allegedly untimely request for review was not based on any law or rule, and was instead based on the incorrect assumption that the ALJ lacked "jurisdiction" to

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[81] WAC 388-02-0215.
[82] *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007).
[83] AR 35 (Conclusion of Law 5.3).

review the request. The decision was, therefore, arbitrary and capricious, and must be reversed.

4. Ms. Castillo meets the good cause standard

As directed by the rule, this Court should apply the standards of Civil Rule 60 to evaluate Ms. Castillo's claim for good cause.[84] Under the standards of CR 60(b), a Superior Court could vacate a dismissal under similar circumstances. This Court should likewise find Ms. Castillo has good cause for her "late" submission.

WAC 388-02-0020 expressly provides relief for persons who have failed to appear, to act or respond to an agency action which deprives them of an opportunity to be heard in the administrative setting. The basis for such relief is "good cause." A court must use CR 60(b) as a guideline when the party's reasons do not fall under the good cause examples set forth in WAC 388-02-0020(2).[85] CR 60(b)(1) provides for relief from judgments based on "mistake, inadvertence, surprise, [and] excusable neglect...."[86] The examples of good cause set out in the regulation are not exclusive.[87]

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[84] WAC 388-02-0020(1).
[85] *Puget Sound Medical Supply v. Dep't of Soc. and Health Servs.*, 156 Wn. App. 364, 373, 235 P.3d 246 (2010).
[86] *See also Calhoun v. Merritt,* 46 Wn. App. 616, 731 P.2d 1094 (1986).
[87] *See Puget Sound,* 156 Wn. App. at 373.

A proceeding to set aside a default judgment is equitable in character.[88] "The overriding reason should be whether justice is being done. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of outcome."[89]

Courts apply the four-part *White v. Holm* sliding scale test as a guide when vacating a default order under CR 60.[90] In applying this standard, the defaulting party must show: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. The test is a sliding scale, such that establishing a strong defense will require less of a showing as to the reason for the default.[91]

Ms. Castillo relied upon the plain language of the Department's notice in making her request for a supervisory review. Interpretation of the

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[88] *Morin,* 160 Wn.2d at 754.
[89] *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), *citing Griggs v. Averbeck Realty Inc.*, 92 Wn.2d at 582.
[90] *White v. Holm,* 73 Wn.2d 348, 438 P.2d 581 (1968).
[91] *Id.* at 352.

notice in this matter should be guided by the express concern of the legislature that parents in child abuse and neglect proceedings be provided with adequate due process, including notice of and an opportunity to appeal adverse findings.[92] Such reliance, particularly upon the inadequate language of the notice drafted by the Department, constitutes good cause for the alleged failure to timely request internal agency review. The second and third prong of the *White v. Holm* test are thus met. Ms. Castillo's mistake was excusable given the wording of the notice she followed, and a day-late filing does not show evidence of undue delay in seeking relief.

Moreover, Ms. Castillo's defense is strong. The Department relied on conclusory statements and assumptions to find that Ms. Castillo neglected her children. There is no nexus between the Department's allegations and Ms. Castillo committing neglect that rises to the level of a "clear and present danger" to the children's health or welfare.[93] Ms. Castillo is not accused of physically abusing her children; depriving them of love, food, or shelter; or otherwise harming them or taking any action to neglect them in any way. The finding she challenges is based solely on the

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[92] *See Boise Cascade Corp. v. Huizar,* 76 Wn. App. 676, 684, 887 P.2d 417 (1994) (rules should be interpreted in a manner consistent with the legislative purpose of the underlying statute).
[93] *See* RCW 26.44.020 (defining "neglect").

belief of one CPS social worker who reviewed a written police report.[94] There is no evidence that the social worker confirmed that the conditions existed, or that they existed to the degree alleged in the written report. The CPS letter contains no allegations linking these claims to the safety of the children. Ms. Castillo denied the existence of these harms directly to the social worker.[95] These allegations, based on double hearsay, are not facially sufficient to sustain a finding of child neglect under RCW 26.44.

The fourth prong of the *White* test looks at the hardship to DSHS of permitting review. The balancing of the harms clearly favors Ms. Castillo. As stated by the Court of Appeals in *Ryan v. DSHS*, "an alleged perpetrator has a significant interest in a damaging, irreversible, publicly available finding of wrongdoing. Given the Department's extensive ability to act on initial reports and substantiated findings, the State has, at best, a limited interest in adding a final finding to its registry that has not been put through the rigors of an adversarial proceeding to determine its validity."[96]

The state's interest in avoiding due process and maintaining inaccurate records is minimal.[97] Ms. Castillo's request, by the Department's argument, was one day late. The Department will suffer no

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[94] AR 62-63.
[95] AR 71-72.
[96] *Ryan v. Dep't. of Soc. and Health Servs. (DSHS)*, 171 Wn. App. 454, 473, 287 P.3d 629 (2012).
[97] *See, e.g., Humphries v. Los Angeles Cnty.*, 554 F.3d 1170, 1194 (2008), *rev'd on other grounds,* 562 U.S. 29 (2010).

hardship or be at all prejudiced by doing what the statute already commands: provide alleged perpetrators with due process. The ALJ's failure to grant Ms. Castillo a hearing based on good cause for the late request for review was arbitrary and capricious.

Under the provisions of WAC 388-02-0020 and CR 60, this Court should grant Ms. Castillo a hearing on the merits of the CPS finding.

D. If the Department has no authority to correct erroneous findings in these circumstances, then the process is unconstitutional as applied to Ms. Castillo

If this Court finds that Ms. Castillo's request was late and that the Department lacks authority to review a late request under RCW 26.44.125, then the Department's process is unconstitutional as applied to Ms. Castillo, under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. The Department's process creates a substantial risk that a person will be erroneously deprived of her significant protected interests.

Under the current system a person could be deprived of her protected interest, permanently, if she did not see a finding notice within 30 days of its delivery to her house, either because she was in the hospital, the person receiving the letter never gave it to her, or she otherwise failed

to accurately interpret the Department's directions in the letter.[98] The Department would have no ability to correct an error because it lacked authority to review findings older than 30 days from the date of delivery. Such a system violates due process and should be declared unconstitutional as applied to Ms. Castillo.

1. Ms. Castillo has a protected interest in not having a founded finding on her record

Ms. Castillo is entitled to due process of law prior to the deprivation of a protected interest. State action that imposes a stigma that impairs an individual's eligibility to exercise rights under state law or to work in a chosen field, implicates protected liberty interests subject to the requirements of due process.[99]

Once a substantive right has been created, "it is the Due Process Clause which provides the procedural minimums, and not a statute or regulation."[100] In analyzing a party's due process claim, a reviewing court

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[98] This flaw in the process illustrates the difference between this matter and that of *State v. Snyder*, which concerned an alleged perpetrator's failure to request an administrative hearing two years after timely requesting internal review. 194 Wn. App. 292, 376 P.3d 466 (2016). *Snyder* deals with the problem of a person who does not act on constructive notice, not the situation of the person who acts in response to a flawed notice.

[99] *See, e.g., Ritter v. Bd. of Comm 'rs of Adams Cnty Pub. Hosp. 6 Dist. No. 1,* 96 Wn.2d 503, 511 (1981); *Ryan,* 171 Wn. App. at 471 (procedures used in challenging state administrative findings of abuse or neglect of a vulnerable adult are subject to due process); *Pal v. Dep't of Soc. and Health Servs.*, 185 Wn. App., 342 P.3d 1190 (2015).

[100] *Geneva Towers Tenants Org. v. Romney,* 504 F.2d 483, 491 n. 13 (9th Cit. 1974); *Nozzi v. Hous. Auth. of Los Angeles,* 806 F.3d 1178, 1192 (9th Cir. 2015) ("Technical

should not address whether the state agency complied with the requirements of applicable regulatory procedures, but whether it complied with the requirements of the Due Process Clause.[101]

One of the fundamental requirements of due process is "the opportunity to be heard".[102] Another is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".[103] The question of the adequacy of such notice is a mixed question of law and fact.[104] Failure to provide adequate notice of adverse state action and how to challenge it denies due process of law.[105]

To determine what process is due in a particular context, courts employ the test set forth in *Mathews v. Eldridge,* which calls for the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the

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compliance with regulatory procedures does not automatically satisfy due process requirements.").

[101] *Id.*

[102] *Grannis v. Ordean,* 234 U.S. 385, 394 (1914).

[103] *Mullane v. Cent. Hanover Bank and Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 562, 94 L.Ed. 865 (1950).

[104] *Speelman v. Bellingham/Whatcom Cnty. Hous. Auth.,* 167 Wn. App. 624, 273 P.3d 1035 (2012).

[105] *Id.*

fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[106]

The Department's process, as applied, violates the Due Process Clause because it deprives Ms. Castillo of a protected interest without any procedure which can correct a manifest error based on a mistake and excusable neglect.

a. Ms. Castillo's Interest

First, the private interest that is affected by the official action in this case is substantial. Ms. Castillo has a significant interest in not being branded as a negligent parent in agency records, and in not having her role as a parent and her future employment possibilities severely limited by the finding. The Court of Appeals in *Ryan v. DSHS* held that an alleged perpetrator of abuse or neglect has "a significant interest in a damaging, irreversible, publicly available finding of wrongdoing".[107]

The harm to Ms. Castillo is immediately imposed without any notice and is effectively permanent. The Department provides no avenue for expungement or vacation of CPS founded records. A CPS finding permanently excludes a person from employment in certain fields, such as home health, and can severely curtail other opportunities when discovered

[106] 424 U.S. 319, 335, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976)
[107] 171 Wn. App. at 471. *Ryan* concerned the application of a similar process for adult protective services.

through a routine background check.[108] Ms. Castillo's interest in having due process is substantial, insofar as it is the only way she can prevent an effectively permanent harm to her reputation and employment opportunities.

b. The risk of erroneous deprivation

Under the second part of the *Mathews* inquiry, the court must examine whether the procedures provided to Ms. Castillo present a risk of erroneous deprivation of her protected interest, as well as the value of any additional safeguards. The risk of erroneous deprivation in this system is high: if the Court agrees that the Department lacks authority to correct erroneous findings because an alleged perpetrator is one day late, then even a case of mistaken identity or factual innocence could never be corrected in circumstances such as these. Yet, that is precisely the position that both CPS management and the Department's attorney took in this case: they believed that the Department lacked legal authority to review this finding. This cannot be correct, or it is in violation of Ms. Castillo's rights to due process.

The risk of erroneous deprivation is high in a system where an administrative agency lacks power to correct its own errors.

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[108] RCW 74.39A.056; *see also* WAC 388-113-0030 (listing agencies using founded findings for disqualifications from licensure or employment).

This is particularly true given the subject matter at hand. As the Ninth Circuit noted, child abuse or neglect allegations are the type of allegations that require "delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement."[109] Foreclosing the ability to conduct these hearings raises that risk. "The risk of error is considerable when such determinations are made after hearing only one side."[110]

The notice provided to Ms. Castillo created further risk of an erroneous result. To determine the fairness and reliability of the notice provided by the Department, the Court should look to *Mullane v. Central Hanover Bank & Trust Co.* and its progeny for guidance.[111] Though *Mullane* dealt with notice by publication, the due process tenets stated are applicable in this context as well. "[W]hen notice is a person's due, process which is a mere gesture is not due process."[112] To be constitutionally adequate, notice must be "of such nature as reasonably to convey the required information [.]"[113] The means employed must be "reasonably certain" to "actually inform" the party, and in choosing the

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[109] *Chalkboard Inc. v. Brandt*, 902 F.2d 1375, 1380-81 (9th Cir. 1989).
[110] *Id.* at 1381.
[111] 339 U.S. 306 (1950); *Nozzi v Hous. Auth. of Los Angeles,* 806 F.3d 1178, 1192 (9th Cir. 2015).
[112] *Mullane,* 339 U.S. at 314. .
[113] *Id.* at 314.

means, one must take account of the "capacities and circumstances" of the parties to whom the notice is addressed.[114]

The Department could easily make the notice clearer. The statute itself requires the Department to use "plain language" in these notices.[115] Notice should be clear to the intended recipient, such as "from the date someone in your household signs for this letter" or "from the date this letter is delivered to your address." The Department's language led Ms. Castillo to count the days from "the date *you* receive this letter," and she submitted her written request for review in reliance on that timing. A few additional words could have clarified the concept, preventing erroneous deprivation of her rights by default.

The risk of erroneous deprivation of Ms. Castillo's liberty interest under the procedures used here was significant. A hearing on the merits will establish that the neglect finding against Ms. Castillo is erroneous. Unless this court remands the case for a hearing, Ms. Castillo is subject to a stigma and employment bar for the rest of her life. The additional safeguards requested by Ms. Castillo—simple and clear notice and the ability to have a finding reviewed even when late—would have given her an opportunity to contest the allegations against her. A process which does

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[114] *Id.; see also Goldberg v. Kelly,* 397 U.S. 254, 268-69 (1970); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 14 n.15 (1978).
[115] RCW 26.44.125(2).

not allow for a recipient's literal reading of the Department's own notice carries a high risk of erroneous deprivation.

c. The Department's interest in maintaining inaccurate default findings is minimal

Turning to the third part of the *Mathews* inquiry, the Court should consider the burden of additional procedures and the government's interest in the issue. The Department has, at best, a limited interest in adding a final finding to its public records that is based only upon a default finding and supported only by initial reports of substantiated findings.

i. The Department could have given more accurate notice

The procedural burdens of increased process are minimal. The Department could either have modified its notice to clarify its intent, or it could allow persons confused by the notice to have good cause for a "late" filing.

The notice stated only that Ms. Castillo had to submit a "request for a review within 30 calendar days from the date [she] receive[d] this letter". If the Department intended to say that she had 30 days to request review from the time anyone received the letter, it would not be difficult to say so. The Department could have easily explained that "received" in the notice meant when anyone in her household "received" the notice of finding. Such information could be readily incorporated into the standard

notice form without placing any burden on the government's fiscal and administrative resources.[116] The suggestions Ms. Castillo offers above clarify the deadline by adding only three or four words to the language in CPS's notice.[117]

Additionally, it would not be burdensome for the Department to grant a good cause exception to persons who are confused by this notice. As explained above, the Department already allows a process for granting good cause for errors of mistake, which explicitly contemplate a failure to timely respond to a notice.[118] Ms. Castillo was "late" by one day, so the evidence regarding the incident could not conceivably be stale.

ii. The Department has no interest in maintaining inaccurate findings

The Department's interest in avoiding hearings is minimal. The Department has an interest in reviewing findings when the underlying information is still fresh. It has little interest in diluting its CPS database

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[116] *See Nozzi*, 806 F.3d at 1198 (noting there is no reason to conclude that "printing six paragraphs of information is any more burdensome than printing four paragraphs of information", *quoting Henry v. Gross,* 803 F.2d 757, 768 (2d Cir. 1986)).

[117] Even if the Court were to find that the Department complied with due process here the doctrine of substantial compliance still entitles Petitioner to a hearing. *See Ruland v. Dep't of Soc. and Health Servs.,* 144 Wn. App. 263, 274 (2008) (foster parents challenging a finding of neglect substantially complied with the statutory process for seeking review and were entitled to an administrative appeal hearing).

[118] *See* WAC 388-02-0020.

with potentially inaccurate or false information based upon default findings.[119]

In *Humphries v. Los Angeles*, the Ninth Circuit found that a state had no interest "in maintaining a system of [child abuse] records that contains incorrect or even false information."[120] The court noted that the minimal administrative burden posed by additional procedures were "precisely the sort of administrative costs we expect our government to shoulder."[121] The *Humphries* court noted that the question to be asked was not whether there is a significant government interest in maintaining findings, but whether the government had a significant interest in maintaining a limited process by which such findings could be challenged.[122] The Ninth Circuit answered that it did not and held the California process unconstitutional.[123]

Similarly, the question to be asked for Ms. Castillo is whether the state has an interest in avoiding administrative hearings solely on technicalities, rather than having their investigative determinations properly vetted through an impartial review. Like in *Humphries*, the state

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[119] *See, e.g., Humphries v. Los Angeles Cnty.*, 554 F.3d 1170, (2008), *rev'd on other grounds*, 562 U.S. 29 (2010).
[120] *Id.* at 1194.
[121] *Id.*
[122] *Id.*
[123] The *Humphries* court considered a process that differed markedly from this state's process, yet the common denominator is the state interest in maintaining findings that have not been vetted through an administrative hearing.

has no such interest that is compelling enough to deprive Ms. Castillo of the process that she is due.

Pursuant to the *Mathews* constitutional due process analysis, the Department failed to provide adequate due process to Ms. Castillo. The balance of interests here tips in favor of reversing the agency decision and granting Ms. Castillo a hearing to challenge the finding against her.[124]

E. The Board of Appeals erred in denying Ms. Castillo's petition for review

The Board of Appeals Review Judge erred by refusing to review Ms. Castillo's petition because it was received one day late. The judge concluded that it was unreasonable for Ms. Castillo's then-counsel to assume six days would be adequate for mailing the petition.[125] The judge's conclusion is unsupported by facts in the record and is arbitrary and capricious.

The BOA judge relied on the fact that there was nothing in the administrative record to determine whether Ms. Castillo had a prima facie defense to establish good cause,[126] ignoring the fact that it was the ALJ's erroneous determination on jurisdiction that deprived her of that ability to

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[124] The Legislature explicitly recognizes the importance of due process to a parent accused of abuse or neglect and her entitlement to it. RCW 26.44.125; RCW 26.44.100(1) ("The legislature finds parents and children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that all citizens, including parents, shall be afforded due process" in CPS proceedings).
[125] CP 18, 26.
[126] *Id.* at 26.

develop the record. Further, the judge ignored the legal argument in the record as to Ms. Castillo's argument for why she should have a hearing. Finally, the judge erred because she relied on the fact that the petition for review itself contained only one line[127]—a petition written when Ms. Castillo's attorney had no reason to expect it would be late—as a showing that Ms. Castillo failed to show a prima facie defense. The judge essentially ruled that Ms. Castillo's inability to see into the future, determine that her petition would be late, and argue that she has a prima facie defense should deprive her of the ability to argue good cause. In fact, the attorney's explanation for the late filing was clear and explained fully the circumstances surrounding the late filing of the petition for review.[128]

The Department's Board of Appeals, like the Department itself, has erroneously denied Ms. Castillo the right to review of this finding on overly technical and arbitrary reasoning that have no basis in the purpose of RCW 26.44.125: the protection of vulnerable persons and the provision of due process to the accused.

F. Ms. Castillo is entitled to attorney fees under RCW 4.84.350

Ms. Castillo, as a prevailing party, is automatically entitled to attorney fees under RCW 4.84.350(1) unless the Department can prove

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[127] *Id.*
[128] CP 18, 26.

that its "actions were substantially justified or that circumstances would make that award unjust."[129] Actions are substantially justified where the Department's action "has a reasonable basis in fact and law."[130]

The Department's actions in this case were not substantially justified. First, the Department erred in asserting that it lacked the legal authority to review the neglect findings any time after 30 days had passed from when the finding letter was delivered to Ms. Castillo's house. Second, the ALJ, and by extension, the Department erroneously failed to consider whether Ms. Castillo had good cause for her late filing even if the request for review was technically late. Failing to consider arguments made by Ms. Castillo, based on an erroneous legal theory of "subject matter jurisdiction", are not based on law.

Despite the confusing and unclear notice, the harsh impact on Ms. Castillo of an adverse CPS finding that becomes final by default, the lack of prejudice or harm to the Department from a one-day "delay" in receiving her hearing request, and the miscarriage of justice that is inherent in the denial of a hearing to contest a finding, the Department has stuck to its position. The Department's actions are not justified. Ms. Castillo is entitled to attorney fees.

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[129] *Constr. Indus. Training Counsel v. Wash. State Apprenticeship & Training Counsel*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999).
[130] *Id.*

V. CONCLUSION

Ms. Castillo respectfully requests this Court to rule as follows: (1) that she complied with the requirements of requesting of hearing; in the alternative (2) that there was jurisdiction to hear the appeal; and (3) that she had good cause for requesting an allegedly late hearing request. Alternatively, if the agency lacks authority to review her request under state law, the Court should find that the notice and process violates due process of law. Ms. Castillo is also entitled to attorney fees and costs. The Court should reverse the administrative decision to dismiss Ms. Castillo's request for a hearing and provide her the opportunity to have a full determination on the merits of the Department's CPS finding.

Respectfully submitted this 28th day of September, 2016.

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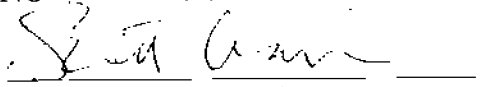

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COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

DAYANARA CASTILLO,	**No. 49063-3-II**
Appellant,	**CERTIFICATE OF SERVICE**
vs.	
DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON,	
Respondent.	

I, Janel Riley, certify under penalty of perjury under the laws of the State of Washington that on the 28th day of September, 2016, I caused a true and correct copy of: Brief of Appellant, to be served on the following, via Legal Messenger:

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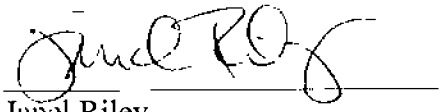
Dated: September 28th, 2016



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